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No. 03-1693

IN THE

Supreme Court of the United States

McCREARY COUNTY, KENTUCKY, *et al.*,
Petitioners,

v.

AMERICAN CIVIL LIBERTIES
UNION OF KENTUCKY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS JUDICIAL WATCH, INC.

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Judicial Watch, Inc. respectfully submits this brief *amicus curiae* in support of Petitioners McCreary County, Kentucky, Pulaski County, Kentucky and Harlan County, Kentucky. Pursuant to Supreme Court Rule 37.3(a), counsel for the parties have consented to the filing of this amicus brief.[1] Letters of consent to the filing of this brief have been filed with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

Judicial Watch, Inc. is a public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch, Inc. seeks to promote accountability, transparency and integrity in the law and ethics and morality in public life. Since its inception more than ten years ago, Judicial Watch, Inc. has filed hundreds of lawsuits in state and federal courts across the nation in pursuit of these goals. Judicial Watch, Inc. is participating as amicus in this case for two reasons. First, Judicial Watch, Inc. believes this case is an important opportunity for the Court to clarify its Establishment Clause jurisprudence and the *Lemon* test. Second, as a tax-exempt educational organization, Judicial Watch, Inc. has an interest in supporting efforts by government officials to educate the public about the foundation of our laws, which is precisely the goal Petitioners

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[1] Pursuant to Rule 37.6, Judicial Watch, Inc. states that no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

purportedly sought to achieve in creating the displays at issue in this lawsuit.

SUMMARY OF THE ARGUMENT

One of the biggest sources of confusion in contemporary constitutional jurisprudence is the Establishment Clause - specifically, the proper relationship between the Establishment Clause and the protection of individual rights. Does the Establishment Clause directly protect individual rights in the same way the Free Expression Clause does? Or does the Establishment Clause protect individual religious expressions indirectly by prohibiting the creation of a national religion and prohibiting discrimination among various religious groups? These questions have become increasingly difficult to answer due to the confusion in Establishment Clause precedent. The lack of any consistent Establishment Clause principles has led to such artificial "tests" as the *Lemon* test, which has only increased the confusion surrounding the application of the Establishment Clause. The *Lemon* test was promulgated as the end-all and be-all of Establishment Clause jurisprudence, but was almost immediately diminished or ignored by this Court. Nonetheless, it has become the standard that the lower courts feel obligated to follow. This case presents the Court with the opportunity not only to clarify the proper application of the Establishment Clause, but also to overrule the *Lemon* test. However, even if the Court determines that a clarification of the Establishment Clause is unnecessary and applies the *Lemon* test to this case, the Circuit Court clearly erred in affirming the permanent injunction entered against Petitioners because none of the displays at issue violate the Establishment Clause.

ARGUMENT

I. The Circuit Court's Erroneous Holding Stems From A Basic Misconception of the Establishment Clause.

Constitutional interpretation generally involves dissecting the actual language and studying the history surrounding the provision being interpreted. *See Waltz v. Tax Commission of New York*, 397 U.S. 664, 681-82 (1970), *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966), *Kansas v. Colorado*, 206 U.S. 46, 91 (1907). Only when this information is lacking should the courts engage in other methods of interpretation. With regards to the Establishment Clause, both the language and the history of the clause are readily available and understandable. The Court should not pass up this opportunity to clarify this vital constitutional principle because the current state of Establishment Clause jurisprudence leaves the lower courts and state and federal officials in the position of never knowing how to conform their conduct to the requirements of the Constitution. As a result, officials may refrain completely from any action – even to the detriment of individuals' rights of free expression – for fear of costly litigation. This is exactly what the Religion Clauses were meant to prevent.

A. *Everson* - The Initial Source of Confusion.

The contemporary understanding that the Establishment Clause protects individual rights through the Fourteenth Amendment can be traced to dicta in *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1 (1947). In *Everson*, Justice Black, writing for the majority, declared:

> The broad meaning given the [First] Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First [Amendment] applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the 'establishment of religion' clause.

Id. at 15. And so the misapplication of the Establishment Clause began.

Justice Black, while assured that there was "every reason" to give a broad construction to the Establishment Clause, did not in fact, give *any* reason. *Id.* There is no historical account or legal authority for such a broad interpretation. Instead, the Court developed a laundry list of do's and dont's, and, combined with a reference to Thomas Jefferson's often mis-cited "wall of separation" analogy, created a constitutional aberration.

Unlike the Free Expression Clause, the Establishment Clause, as is plainly apparent from the language and history of the clause, is a federalism clause. Its purpose is not the direct protection of individual rights, like the Free Expression Clause. Rather, the Establishment Clause was intended to "prevent Congress from interfering with state establishments." *Elk Grove Unified School v. Newdow*, 542 U.S. __, 124 S.Ct. 2301, 2330 (2004) (Thomas, J., *concurring*). In *Newdow*, Justice Thomas found that "the Establishment Clause does not purport to protect individual rights," and, incorporating the Establishment Clause into the

panoply of individual rights protected by the First Amendment "prohibit[s] precisely what the Establishment Clause was intended to protect – *state* establishment of religion." *Id.* at 2330-31 (emphasis in original). Justice Thomas summed it up perfectly in *Zelman v. Simmons-Harris*, 536 U.S. 639, 679 (2002) by stating that, "while the Federal Government may 'make no law respecting an establishment of religion,' the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest." It is this relationship that is clearly demonstrated in the "text and history" of the Establishment Clause itself. *See id.*

B. The Text And History of the Establishment Clause Is A Federalism Clause.

According to historical accounts, one of the most vigorous debates during the ratification of the Constitution was the debate surrounding the inclusion of a Bill of Rights, particularly the inclusion of the Religion Clauses. *See Wallace v. Jaffree*, 472 U.S. 38, 92-93 (1985) (Rehnquist, J., *dissenting*). The language proposed by Madison to the House of Representatives during this debate was as follows: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or in any pretext, infringed." *Id.* at 94 (*quoting* 1 Annals of Cong. 424, 434 (1789)). This language was revised several times by a Select Committee to read simply: "'[No] religion shall be established by law, nor shall the equal rights of conscience be infringed.'" *Id.* at 95 (*quoting* 1 Annals of Cong. 729 (1789)). Several

representatives expressed concern over this wording and, in particular, whether it could harm religion in the future. *Id.* at 95-96.

Madison proposed adding the word "national" as a modifier to the word "religion." *Id.* at 96. He thought the addition of the word "national" would "point the amendment directly to the object it was intended to prevent." *Id.* Eventually, Madison withdrew this proposal, and the language that was ratified is the language that is presently in the Bill of Rights: "Congress shall make no law respecting the establishment of religion." U.S. CONST., amend I. However, the debates that preceded adoption of this language made clear that, "the evil to be aimed at, so far as those who spoke were concerned, appears to have been the establishment of a national church, and perhaps the preference of one religious sect over another; but it was definitely not concerned about whether the Government might aid all religions evenhandedly." *Wallace*, 472 U.S. at 99 (Rehnquist, J., *dissenting*).

Evidence of this purpose can be seen in the role religion took in our early Government. The first and most telling example was the enactment of the Northwest Ordinance in 1789. This was a re-enactment of the Northwest Ordinance of 1787, which stated: "[religion], morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Id.* at 100. Because the Northwest Ordinance was reenacted during the Bill of Rights' ratification process, "it seems highly unlikely that the House of Representatives would simultaneously consider proposed amendments to the Constitution and enact an important piece of territorial

legislation which conflicted with the intent of the proposals." *Id.*

Also in 1789, House representatives proposed that President George Washington issue a Thanksgiving Day proclamation. *See id.* at 100-102; *see also Lynch v. Donnelly*, 465 U.S. 668, 675, n. 2 (1984). Washington subsequently proclaimed November 26, 1789 as a day "to be devoted by the people of these States to the service of that great and glorious Being who is the beneficient author of all the good that was, that is, or that will be...." *Wallace*, 472 U.S. at 102 (Rehnquist, J., *dissenting*). Washington's Proclamation goes on to declare that the day is set apart to "[offer] our prayers and supplications to the Great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions...to promote the knowledge and practice of true religion and virtue...." *Id.*

Washington's Thanksgiving Day Proclamation, rather than unusual, became the norm for U.S. presidents. *Lynch*, 465 U.S. at 675.[2] In addition to issuing proclamations containing an overtly religious message, U.S. presidents also have issued Executive Orders and given inaugural addresses containing religious themes. *See Lynch*, 465 U.S. at 676; *see also Lee v. Weisman*, 505 U.S. 577, 632-35 (1992) (Scalia, J.,

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[2] For example, Presidents John Adams and James Madison also gave similar Thanksgiving Proclamations. *Wallace*, 472 U.S. at 103 (Rehnquist, J., *dissenting*). President Ronald Reagan signed a Joint Congressional Resolution on October 4, 1983 declaring 1983 the "Year of the Bible." *Id.* at 175.

dissenting).[3] The Executive branch is not alone in engaging in religious acts. In addition to the Northwest Ordinance and Joint Resolution regarding Washington's Thanksgiving Proclamation, Congress has issued Acts of Congress and given congressional aid grants containing religious themes and opens its congressional sessions with prayer. *See Lynch*, 465 U.S. at 676, *Wallace*, 472 U.S. at 401-05 (Rehnquist, J., *dissenting*), *Lee*, 505 U.S. at 635 (Scalia, J., *dissenting*).[4] Even the Judicial branch has invoked religion routinely. This Court's sessions open with the invocation "God save the United States and this Honorable Court." *See Lee*, 505 U.S.

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[3] Presidents Thomas Jefferson (despite his "wall of separation of church and state" analogy), James Madison, and George H. Bush all invoked God in their inaugural addresses. *Lee*, 505 U.S. at 633-64 (Scalia, J., *dissenting*). Presidents Abraham Lincoln, Benjamin Harrison, Andrew Jackson, Woodrow Wilson, William McKinley, Harry S. Truman, Dwight D. Eisenhower and Gerald Ford all made religious references in their inaugural addresses. *See* William J. Federer, America's God and Country Encyclopedia of Quotations 227, 236-37, 279, 308, 378, 445, 589, 698 (2000). And our current president, President George W. Bush imbued his first inaugural address with religious themes. *Available at* http://www.freerepublic.com/forum/a3a6a221f3e55.htm.

[4] For example, in 1787, Congress made a grant of land to the Ohio Co. A portion of this land was "for the support of religion." *Wallace*, 472 U.S. at 104 (Rehnquist, J., *dissenting*). On October 3, 1863, an Act of Congress designated an annual National Day of Thanksgiving. *See* William J. Federer, America's God and Country Encyclopedia of Quotations 172 (2000). The Act of June 7, 1897 granted public money for the purpose of supporting sectarian Indian education. *Id.* at 103 (Rehnquist, J., *dissenting*). Additionally, Congress has issued proclamations deeming Christmas and Thanksgiving as National Holidays in religious terms and permitted federal employees to be released from work while still being paid with pubic revenues. *Lynch*, 465 U.S at 676. Congress has also provided for publically funded chaplains for the Senate and House and the military. *Id.*

at 635 (1992) (Scalia, J., *dissenting*). Additionally, the frieze of this Court contains a depiction of the foundations of American law, including an image of Moses carrying the Ten Commandments. *See Lynch*, 465 U.S. at 677. In *Zorach v. Clauson*, 343 U.S. 306, 684 (1952), the Court held that "we are a religious people whose institutions presuppose a Supreme Being."

These examples, in addition to our national motto, our currency, and our Pledge of Allegiance, all demonstrate that there was never meant to be a complete separation of religion and government. Rather, the Establishment Clause was only meant to proscribe actions of a national religion or church.

II. The *Lemon* Test Has Outlived Its Usefulness And the Court Should Expressly Overrule It.

Even if the Establishment Clause is a guarantee of individual rights through the Fourteenth Amendment, the test announced in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) has outlived its usefulness, and the Court should officially overrule it. In *McCreary v. ACLU*, 354 F.3d 438, 445, 463-64 (2003), both the majority and dissenting opinions discuss this Court's reservations about the *Lemon* test. Nonetheless, both the majority and the dissent felt they were obligated to follow *Lemon* until this Court overrules it. *Id.* This is not the first time the Court has been asked to clarify or overrule *Lemon*. In both *Lee v. Weisman* and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), the Court opted not to reconsider the *Lemon* test, or its practicability. *Lee*, 505 U.S. at 586-87, *Lamb's Chapel*, 508 U.S. at 395, n. 7. Since that time *Lemon* has become no

clearer. In fact, *McCreary* highlights the difficulties lower courts have had understanding and applying the test.

A. *Lemon's* Background.

The issue before the Court in *Lemon* was the constitutionality of two state statutes. The States of Pennsylvania and Rhode Island had passed very similar statutes authorizing those states to reimburse costs related to the teaching of secular subjects by nonpublic school teachers. *Lemon*, 403 U.S. at 607-10. The Court, led by Chief Justice Burger, held that the statutes violated the Establishment Clause, as "the Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn." *Id.* at 625. This historically inaccurate assessment of the constitutional boundaries of religion and government became the *Lemon* test.[5] The test considers whether the offending government action (1) has a secular purpose; (2) does not advance, nor inhibit religion as its primary purpose; and (3) does not foster excessive government entanglement. *Id.* at 612-13. The *Lemon* test has not, however, provided a consistent result when applied to Establishment Clause cases. It has been whittled away and, at times, flatly ignored and even disparaged.

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[5] In addition to failing to consider the historical context of the Establishment Clause, the Court placed a heavy emphasis on the perceived fear of political divisiveness. *Lemon*, 403 U.S. at 622-23. This assumption was unfounded and unfairly fatal to the statutes at issue in *Lemon*.

B. The Whittling Away of *Lemon*.

Just two years after the *Lemon* test was established, it was reduced by the majority in *Hunt v. McNair*, 413 U.S. 734, 741 (1975) to offering only "helpful signposts." Two years following *Hunt*, the majority referred to the *Lemon* test as providing only "guidelines." *Meek v. Pittenger*, 421 U.S. 349, 359 (1975). In *Larson v. Valente*, 456 U.S. 228, 252 (1982), the majority found the application of the *Lemon* test "unnecessary." The following year, the majority held that, while the *Lemon* principle was "well-settled," it was "no more than a helpful signpost." *Mueller v. Allen*, 463 U.S. 388, 394 (1983). In *Lynch v. Donnelly*, the majority found the *Lemon* test "useful," but "emphasized our unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch*, 465 U.S. at 679. In *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Court did not even use the *Lemon* test in its Establishment Clause query. Perhaps most telling of *Lemon's* incoherent progeny is *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, a case alleging an Establishment Clause violation, the Court, led by the author of *Lemon*, Chief Justice Burger, ignored the three-part *Lemon* test altogether. In a little more than a decade, *Lemon's* very own author abandoned the *Lemon* test.

C. Six of the Current Justices, Including Chief Justice Rehnquist, Have Expressed Concern or Outright Dislike For the *Lemon* Test.

As the *McCreary* dissent points out, six of the current justices of this Court have expressed concern over, or outright dislike for, the *Lemon* test. *McCreary*, 354 F.3d at 464. In addition to the concern expressed in *Committee For Public*

Education and Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., *dissenting*), *Wallace v. Jaffree*, 472 U.S. at 110 (Rehnquist, J., *dissenting*), *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 346 (1987) (O'Conner, J., *concurring*), *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., *concurring in judgment, dissenting in part*) and *Lee v. Weisman*, 505 U.S. at 644 (Scalia, J., *dissenting*), the Court has expressed similar concerns in other opinions. As mentioned above, in *Lynch*, the majority expressed caution about being confined to any one test. *Lynch*, 465 U.S. at 679. Additionally, in *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., *dissenting*), Justice Scalia rethought his "assumed validity of the *Lemon* 'purpose' test" and adopted Chief Justice Rehnquists's "pessimistic evaluation" in *Wallace*, in which the Chief Justice wrote that *Lemon* "has no basis in the history of the amendment it seeks to interpret, [it] is difficult to apply and yields unprincipled results...." *Aguillard*, 482 U.S. at 636 (Scalia, J., *dissenting*) (*quoting Wallace*, 472 U.S. at 112 (Rehnquist, J., *dissenting*)).

In *Lamb's Chapel*, Justice Thomas joined Justice Scalia's dissent equating the *Lemon* test to a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles around, after being repeatedly killed and buried...." *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., *dissenting*). Justice Scalia suggests that "the secret of the *Lemon* test's survival...is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to so, but we can command it to return to the tomb at will." *Id.* at 399. The inconsistency in the application of the test – not only in the results the test has yielded but also about whether the test should even be used –

gives added weight to Justice Scalia's "ghoul" analogy. Chief Justice Rehnquist highlighted the absurdity of this inconsistency in his dissent in *Wallace* when he wrote:

> [A] State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show a history class. A State may lend classroom workbooks, but not lend workbooks in which parochial school children write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the zoo or natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing 'services' conducted by the State inside the sectarian school are forbidden, but the State may conduct speech and hearing diagnostic testing inside the sectarian school. Exceptional parochial school students may receive counseling, but it must take place outside the parochial school, such as in a trailer parked down the street. A State may give cash to a parochial school to pay for the administration of state-written tests and state-ordered reporting services. Religious instruction may not be given in public school, but the public school may release students during the day for religion classes elsewhere, and may

enforce attendance at those classes with its truancy laws.

Wallace, 472 U.S. at 110-11 (Rehnquist, J., *dissenting*) (citations omitted).

Lastly, in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 319 (2000), Justices Scalia and Thomas joined Chief Justice Rehnquist's dissent and recounted *Lemon's* "checkered career in the decisional law of this Court." The dissent points out that, while the Court previously used *Lemon* as a guideline, the majority in *Santa Fe* applied it strictly, as if there were no question about its appropriateness. *Id.*

As can be seen from this cursory recitation of post-*Lemon* decisions, the usefulness of the three-part *Lemon* test provided in Establishment Clause jurisprudence has been short-lived. The inconsistency and confusion that has resulted demonstrates why the Court should take this opportunity to overrule *Lemon* and give some clarity and consistency to the lower courts and state and federal officials.

III. Even If the Circuit Court Properly Applied the *Lemon* Test, Petitioners' Actions Do Not Violate the Establishment Clause.

Should the Court decide against overruling the *Lemon* test, it nonetheless is clear that Petitioners' displays are constitutional and the Circuit Court erred in affirming the permanent injunction against them.

A. Petitioners' Neutral Purpose Was Clearly Stated.

Lemon's first prong examines the purpose of the legislation or governmental action at issue. *Lynch*, 465 U.S. at 680. That purpose must be secular, but the legislation or government action will be invalidated "only when [the Court] has concluded there was no question that the statute or activity was motivated *wholly* by religious considerations." *Id.* (emphasis added). Therefore, the Court should find a violation of the first prong of the *Lemon* test only if Petitioners' displays were wholly motivated by religious considerations.

Petitioners have made their intent in creating the displays very clear. They articulated five purposes:

> (1) to erect a display containing the Ten Commandments that is constitutional; (2) to demonstrate that the Ten Commandments were part of the foundation of American Law and Government; (3) [to include the Ten Commandments] as part of the display for their significance in providing 'the moral background of the Declaration of Independence and foundation of our legal tradition'; (4) to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government; and (5) [as stated by the Harlan County School Board] to create a limited public forum on designated walls within the school district for the purpose of posting historical documents.

McCreary, 354 F.3d at 446. Nothing about these five purposes suggests the Petitioners were "wholly motivated by religious considerations" in erecting the displays. Historical accounts of the foundations of our laws and government are quite common, and including the Ten Commandments in such accounts is simply being historically accurate. Only if the Court determines that a stated purpose is a sham should the Court disregard it. *Santa Fe*, 530 U.S. at 308. However, there is no evidence in this case suggesting that Petitioners' stated purposes are not sincere. In *Wallace*, this Court warned against psychoanalyzing legislators and attempting to ascribe "improper motives." *Wallace*, 472 U.S. at 74. As such, the Petitioners' stated purposes should be accepted as sincere and taken at face value – they desired to erect displays containing the Ten Commandments as a *part of* broader displays about the foundations of our laws and government.

B. Petitioners' Displays Do Not Endorse Religion.

The second prong of the *Lemon* test examines whether the primary effect of the legislation or government action is to endorse or inhibit religion. *Lemon*, 403 U.S. at 612. This has also been called the "endorsement test." The primary inquiry is whether, to an objective observer, the legislation or government action could be seen as endorsing religion. *See Santa Fe*, 530 U.S. at 308. This part of the inquiry looks at the both the specific content of the display and the context of the presentation. *See Allegheny*, 492 U.S. at 598.

In this case, the content and context of Petitioners' displays clearly demonstrated that no objective observer could view the displays as governmental endorsements of religion. The school's display contained the following: a copy of the

Ten Commandments, the Star Bangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto, and the Preamble to the Kentucky Constitution. *McCreary*, 354 F.3d at 449. The display also included a School Board Resolution which explained the significance of these items and included a provision allowing for other historical materials to be added to the display at the request of any person. *Id.* at 444. The courthouse displays contained all of the documents included in the school's display, with the exception of the explanation, and also contained a depiction of Lady Justice and a one-page document entitled "The Foundations of American Law and Government Display," which briefly explained the role of the Ten Commandments in the formation of Western legal thought. *Id.* at 443. All of the items were the same size, and the displays placed no undue emphasis on any one document. *Id.* at 454.

The Circuit Court erred by assigning too much attention to the Ten Commandments instead of the display as a whole. As stated in *Lynch*, the inquiry is for the display *as a whole*. *See Lynch*, 465 U.S. at 680. Here, the Ten Commandments are only one document in a display that consisted of at least nine separate items. The Ten Commandments are not displayed in a larger-than-life manner, or at a focal point, or with any special identifying markers. Rather, the Ten Commandments are merely one part of an overall unifying theme: the foundations of American law and government. This theme is readily apparent to the objective observer. Despite the Circuit Court's claim to the contrary, there is no lack of "any analytical connection" between the Ten Commandments and the other documents. *McCreary*, 354 F.3d at 460. It is in the nature of all displays that the amount

of information that can be presented to a visitor, student or casual observer must be limited.

Petitioners' displays, including the Ten Commandments, are located in two courthouses and a school – places where our laws are either enforced or studied. Much like the Court's analysis in *Lynch* of a creche in a Christmas display located in a city park during the Christmas season, Petitioners' displays are logically located, contain a number of diverse elements, and demonstrate the historical development of the law. *See Lynch*, 465 U.S. at 679-80.

C. Petitioners' Displays Do Not Incorporate Excessive Government Entanglement.

Neither the district court nor the Circuit Court discussed the entanglement prong of the *Lemon* test because they concluded that Petitioners' displays violated the first two prongs. *McCreary*, 354 F.3d at 461, n. 11. However, in order to complete the *Lemon* inquiry, the third prong will be addressed briefly. The third prong examines whether the statute or government action will foster excessive government entanglement with religion. *Lemon*, 403 U.S. at 613. In *Lemon*, the Court stated that in order to determine whether entanglement was excessive, "we must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Id.* at 615. Examining these factors, it is clear that no excessive entanglement exists in Petitioners' displays. No particular institutions are benefitting from the displays, no aid is being given by the state, and the displays result in no

relationship between the state and any religious authority.[6] Thus the displays pass the third prong of the *Lemon* test as well.

D. Respondents Have Not Been Subjected to Coercion By Petitioners' Displays.

Although not a part of the original *Lemon* test, the Court has occasionally considered "coercion" an element of its Establishment Clause jurisprudence. *See Aguillard*, 482 U.S at 583-84, *Lee*, 505 U.S. at 595, *Santa Fe*, 530 U.S. at 302-04. The Circuit Court considered whether the displays had any coercive effect on viewers in the context of its endorsement analysis. *McCreary*, 354 F.3d at 460-61. Pulling a page from the Court's decision in *Aguillard*, the Circuit Court in *McCreary* held that students, whose attendance at school is required, and individuals who are required to be present at the courthouses for things "ranging from compulsory jury service to bench warrant decrees," would be subject to coercive pressure by Petitioners' displays. *Id.* This is another example of how Establishment Clause jurisprudence has worked an unconstitutional injustice.

In addition to there being no historical context for the use of a "coercion" test under these circumstances, there simply is no coercion in this case. The Court's use of coercion in *Lee*

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[6] The entanglement factors apply more precisely to cases involving public funds aiding nonpublic schools, agencies or organizations. *See Meek v. Pittenger*, 421 U.S. 349 (1975), *Committee For Public Education and Religion. v. Regan*, 444 U.S. 646 (1980), *Mueller v. Allen*, 463 U.S. 388 (1983) and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). This is yet another example of the difficulties of applying the *Lemon* test in a variety of circumstances.

and *Santa Fe* is based on a misapplication of the word itself. As Justice Scalia pointed out in his dissent:

> [C]oercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force and threat of penalty*. Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities.

Lee, 505 U.S. at 640-41 (Scalia, J., *dissenting*).

In *Elk Grove*, Justice Thomas concurred with Justice Scalia's assessment of *Lee* and the Court's misapplication of "coercion." *Elk Grove*, 124 S.Ct. at 2330. The daily pledge of allegiance given in the Elk Grove elementary schools did not require participation by the students. *Id.* at 2306. In fact, the school district expressly permitted those students who objected on religious grounds to abstain from reciting the pledge. *Id.* The plaintiff filed suit against the school district claiming that the pledge, containing the words "under God," was a violation of the Establishment Clause. *Id.* Although the Court's opinion rested on principles of standing, Justices O'Conner and Thomas both addressed the coercion test. *Id.* at 2326-27 (O'Conner, J., *concurring*), 2328-29 (Thomas, J., *concurring*). Neither found that the students were being coerced. *Id.* The pledge did not result in any student who opted to abstain from recitation to face any penalties. There was no forced proclamation of allegiance to a religion, faith or God. No one was forced to stand or salute. No one was forced to wear a scarlet letter "H" for heathen. In fact, participation in the pledge was completely free from coercion,

both in the constitutional sense and the everyday use of the word. Justice O'Conner points out, "the Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree. It would betray its own principles it if did; no robust democracy insulates its citizens from views that they might find novel or even inflammatory." *Elk Grove*, 124 S. Ct. at 2327 (O'Conner, *concurring*).

The alleged coercion in this case is even more chimerical. Unlike the students in *Lee* and *Santa Fe*, who were assembled at official school events where prayer was offered, the students' only exposure to the school's display is by way of walking past it. Exposure to Petitioner's display in general, or the Ten Commandments in particular, can be avoided by simply not looking at the display. The same can be said about the courthouse displays. First, it is important to note that the Court has never considered the occupants of a courthouse to be of a special nature, or especially impressionable. *See e.g. Aguillard*, 482 U.S. at 583-84. Therefore, for the Circuit Court to have utilized the same coercion standard for the courthouse displays as it did for the school's display is incorrect. Second, as with the school display, no one, even those who are required to be at the courthouse, is required to stop and look at the display. The display can be avoided by not looking at it or simply ignoring it.

CONCLUSION

For the foregoing reasons, Judicial Watch, Inc. respectfully urges the Court to clarify its analysis of the Establishment Clause, overturn the *Lemon* test, and reverse the Circuit Court's injunction against Petitioners so as to permit their displays.

Respectfully submitted,

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